

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

-----In the Matter of the-----)
)
PUBLIC UTILITIES COMMISSION)
)
Instituting a Proceeding to)
Investigate Whether Act 59,)
Session Laws of Hawaii 1974,)
Invalidates, Voids, or Renders)
Unenforceable the 1961 Agreement)
Between the Trustees Under the)
Will and of the Estate of Bernice)
P. Bishop, Deceased; Kaiser)
Hawaii Kai Development Co.; and)
The City and County of Honolulu.)
_____)

DOCKET NO. 2006-0021

ORDER NO. 22317

Filed March 10, 2006
At 1:20 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
INDUSTRY
HONOLULU, HAWAII

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Docket No. 2006-0021

Order No. 22317

ORDER

By this Order, the commission grants the State of Hawaii's ("State") motion to intervene in the commission's investigation to determine whether Act 59, Session Laws of Hawaii 1974 ("Act 59"), invalidates, voids or renders unenforceable the 1961 agreement between the Trustees Under the Will and of the Estate of Bernice P. Bishop, Deceased (the "Trustees"); Kaiser Hawaii Kai Development Co., a Nevada corporation ("Kaiser"); and the City and County of Honolulu ("City"), filed on February 21, 2006 ("Motion to Intervene").

I.

Background

A.

This Investigation

Hawaii-American Water Company ("HAWC"), successor-in-interest to Kaiser, is a public utility authorized to provide wastewater collection, treatment, and disposal services to the residences, condominiums, and commercial establishments in the Hawaii Kai community on the island of Oahu.¹

By Order No. 22254, filed on February 1, 2006, the commission initiated this investigation to determine whether Act 59, which amended Hawaii Revised Statutes ("HRS") § 269-1 ("1974 Amendment"), invalidates, voids or renders unenforceable, that certain agreement entered into by and between Kaiser, the Trustees, and the City, which provides for, among other matters, sewerage services at no charge to the City ("1961 Agreement").² In Order No. 22254, the commission named HAWC, the Division of Consumer Advocacy, Department of Commerce and Consumer Affairs

¹By Order No. 21888, filed on June 23, 2005, in Docket No. 05-0140 ("Order No. 21888"), the commission denied HAWC's June 7, 2005 request for a declaratory ruling regarding the validity of the 1961 Agreement ("Docket No. 05-0140"). In Order No. 21888, the commission stated its intention to initiate a separate proceeding to investigate and examine HAWC's allegation that the 1961 Agreement was invalidated by the 1974 Amendment.

²The investigation was initiated pursuant to HRS §§ 269-7, 269-15, and 269-16, Hawaii Administrative Rules ("HAR") § 6-61-71, and Order No. 21888.

("Consumer Advocate"),³ and the City as parties to this proceeding.

In naming the City as a party, the commission noted that the City had an interest in the outcome of this investigation as a named party to the 1961 Agreement, that the City was a party to Docket No. 05-0103,⁴ and that the City had requested to be made a party to the proceeding by letter filed on July 5, 2005.⁵ However, since the commission was uncertain as to the extent of the State and the Trustees' interests in this proceeding and their willingness to participate in this proceeding, the commission served them with copies of Order No. 22254 and allowed them to file motions to intervene or participate without intervention in accordance with the requirements of HAR Chapter 6-61, Subchapter 4 within twenty (20) days of the date of the order.

³Pursuant to HRS § 269-51, the Consumer Advocate is statutorily mandated to represent, protect and advance the interests of all consumers of utility service and is an *ex officio* party in all proceedings before the commission. See also HAR § 6-61-62.

⁴On August 25, 2005, HAWC filed an application for commission approval to increase its rates and revise its rate schedules and rules for service in Docket No. 05-0103 ("Docket No. 05-0103"). By Order No. 22252, filed on January 31, 2006, the commission granted the City's Motion to Intervene in Docket No. 05-0103. In its Motion to Intervene, the City argued, in part, that HAWC's rate increases and certain rule changes proposed in Docket No. 05-0103 were contrary to the provisions of the 1961 Agreement.

⁵See Letter dated June 30, 2005, and filed on July 5, 2005, from Maile R. Chun, City Deputy Corporation Counsel, to Kris N. Nakagawa, Chief Commission Counsel.

B.

State's Motion to Intervene

On February 21, 2006, the State filed a Motion to Intervene⁶ in this docket pursuant to HAR § 6-61-55.⁷ In its motion, the State contends that the 1961 Agreement exempts all City facilities, parks and schools served by HAWC's system from paying HAWC's sewerage fees. The State claims that in 1965, the legislature transferred the responsibility for the public schools from the counties to the State, under the administration of the State's Department of Education ("DOE").⁸ The State also asserts that under HRS § 27-3, the DOE succeeded to all the rights and powers exercised by the counties in the administration of the transferred functions conferred by law, contract, or other document, and that all reference to a "county, in any law, contract, or document in connection with the functions assigned to the State . . . apply" to the State or the respective state department as if it were specifically named in the law, contract, or document in place of the county or any agency thereof.⁹

Accordingly, the State argues that it has the responsibility for operating and maintaining the educational facilities in Hawaii Kai and that it is entitled to all of the contractual rights previously conferred upon the City by

⁶The State does not request a hearing on its Motion to Intervene.

⁷The Trustees did not file a motion to intervene or participate without intervention in this proceeding.

⁸See Motion to Intervene at 1-2.

⁹Id. at 2.

operation of law, including those under the 1961 Agreement. The State argues that it is a beneficiary of the 1961 Agreement and as such is not obligated to pay for the sewage services that its facilities receive in Hawaii Kai. The State contends that it should be allowed to intervene in this proceeding since it has a vested interest in the resolution of this investigation. The State also notes that it is currently a party to a circuit court proceeding filed by HAWC concerning whether the State is required to pay HAWC sewerage fees in Hawaii Kai, and that the parties to that litigation have agreed to stay the proceeding pending completion of this commission proceeding.

II.

Discussion

A.

State's Motion to Intervene

Intervention in commission proceedings "is not a matter of right but a matter resting within the sound discretion of the commission."¹⁰ HAR § 6-61-55 sets forth the requirements for intervention in commission proceedings. It states, in relevant part:

- (a) A person may make an application to intervene and become a party by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.

¹⁰See In re Application of Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975).

(b) The motion shall make reference to:

- (1) The nature of the applicant's statutory or other right to participate in the hearing;
- (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
- (3) The effect of the pending order as to the applicant's interest;
- (4) The other means available whereby the applicant's interest may be protected;
- (5) The extent to which the applicant's interest will not be represented by existing parties;
- (6) The extent to which the applicant's participation can assist in the development of a sound record;
- (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding;
- (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
- (9) Whether the applicant's position is in support of or in opposition to the relief sought.

. . . .

(d) Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented.

HAR § 6-61-55 (a), (b) and (d).

Here, the State's interest in this investigation is clear.¹¹ While not a named party to the 1961 Agreement, the State, as the entity responsible for the operations and

¹¹No opposition to the State's Motion to Intervene in this proceeding was filed.

maintenance of the public schools (a function transferred from the counties) is a beneficiary of the 1961 Agreement. A commission decision regarding the issues raised in this investigation could directly and considerably affect the State and its fiscal administration of the schools in Hawaii Kai, and its participation in this proceeding could assist the commission in developing a sound and complete record.

Furthermore, the State is involved in a circuit court proceeding against HAWC regarding its obligations to pay sewerage fees for its facilities in Hawaii Kai; a proceeding currently stayed pending the outcome of this investigation. Thus, the State's interests may not be fully represented by those already parties to this proceeding, and the State's interests appear to differ from that of the general public. Accordingly, the commission finds that the State has a substantial and vested interest that is reasonably pertinent to the matters of this docket, and that its participation in this proceeding will not broaden the issues or unduly delay the proceeding. As such, the commission concludes that the State's Motion to Intervene should be granted.

Nonetheless, the State, as an intervenor, is cautioned that its participation in this docket will be limited to the issues raised in this docket. The commission will preclude any effort by the State to unreasonably broaden the issues, or unduly delay the proceeding, and will reconsider the State's participation in this docket if, at any time, during the course of this proceeding, the commission determines that the State is

unreasonably broadening the pertinent issues raised in this docket or unduly delaying the proceeding.

B.

Lunalilo Home

On February 28, 2006, HAWC filed a Supplemental Status Report in accordance with Order No. 22254 ("Supplemental Status Report"). In its Supplemental Status Report, HAWC states that Lunalilo Home, a charitable institution for the elderly administered by the Trustees Under the Will and of the Estate of William Charles Lunalilo, Deceased ("Lunalilo Trust"), "may be directly affected by the outcome of this investigatory proceeding regarding the validity or enforceability of the 1961 Agreement." According to HAWC, Lunalilo Home became entitled to be treated as a "City" facility under the 1961 Agreement through an agreement dated December 4, 1969, between Lunalilo Trust and Hawaii-Kai Community Services Co., a Nevada corporation ("1969 Agreement"). Thus, HAWC states that it would not object to Lunalilo Home being made a party to this proceeding either through commission directive or at Lunalilo Home's request.

At this time, the commission is not inclined to designate Lunalilo Home as a party to this proceeding without some indication from Lunalilo Home or Lunalilo Trust of its desire to participate in this proceeding. When it issued Order No. 22254, the commission was not aware of the 1969 Agreement and the impact the 1961 Agreement may have on Lunalilo Home; and HAWC made no reference to the 1969 Agreement in its declaratory ruling

request filed in Docket No. 05-0140, which this investigation directly stems from.

Nevertheless, based on the above, the commission finds good cause to allow Lunalilo Home and Lunalilo Trust an opportunity to file a motion to intervene or to participate without intervention in this proceeding. Lunalilo Home and Lunalilo Trust will be served with copies of this order. If either Lunalilo Home or Lunalilo Trust is interested in participating in this proceeding, it may file a motion to intervene or participate without intervention in accordance with the requirements of HAR Chapter 6-61, Subchapter 4 within twenty (20) days of the date of this order.

In Order No. 22254, the commission directed HAWC, the Consumer Advocate, the City (and intervenors or participants, if any) to develop a stipulated protective order, if necessary, and a stipulated prehearing (or procedural) order to govern the matters of this investigation for the commission's review and approval within forty-five (45) days from the issuance of Order No. 22254. Alternatively, each party was to file a separate proposed order for the commission's consideration by the same filing deadline.

The commission will hold HAWC, the Consumer Advocate, the City, and the State (collectively, the "Parties") to the filing deadline initially set forth in Order No. 22254. If Lunalilo Home or Lunalilo Trust opts to file a motion to intervene or participate without intervention in this proceeding within the time prescribed herein, and if party or participant

status is granted, the commission's decision to grant Lunalilo Home or Lunalilo Trust's motion to intervene will be conditioned on its agreement to adhere to the Parties' stipulations (subject to the commission's approval), with any reasonable and necessary adjustments. Moreover, when formulating the stipulated prehearing (or procedural) order, the Parties are reminded to consider the commission's deliberations regarding Docket No. 05-0103, pursuant to HRS § 269-16(d), and any agreed-upon schedule should consider the stipulated regulatory schedule established in Docket No. 05-0103, approved by the commission in Order No. 22304, filed on March 3, 2006.

III.


Orders

THE COMMISSION ORDERS:

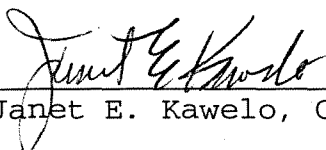
1. The State's Motion to Intervene, filed on February 21, 2006, is granted.
2. Lunalilo Home or Lunalilo Trust may file a motion to intervene as a party or to participate without intervention in this proceeding within twenty (20) days of the date of this order. Any motion to intervene or participate without intervention must comply with all applicable rules of HAR Chapter 6-61, Rules of Practice and Procedure Before the Public Utilities Commission.

DONE at Honolulu, Hawaii this MAR 10 2006.

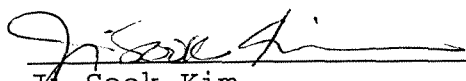
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


J. Sook Kim
Commission Counsel
2006-0021oc

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 22317 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: MAR 10 2006